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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 216

ST. HELENA PARISH SCHOOL BOARD, ET AL.,
Petitioner,

versus

LAWRENCE HALL, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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LAWRENCE HALL, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, the St. Helena Parish School Board, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 9, 1961.

CITATIONS TO OPINIONS BELOW.

The order and judgment of the United States District Court for the Eastern District of Louisiana, Honorable J. Skelly Wright presiding, rendered and entered on the 28th day of April and 25th day of May, 1960, are unreported but are printed in Appendix "B" hereto, pages

19, *et seq.* The opinion and decrees of the United States Court of Appeals for the Fifth Circuit rendered and entered on February 9, 1961, are reported in 287 Fed. (2d) 376, and are printed in Appendix "B" hereto, pages 21, *et seq.* The order of the United States Court of Appeals for the Fifth Circuit denying a rehearing was rendered on April 13, 1961.

JURISDICTION.

The opinion and judgment of the Court of Appeals was entered on February 9, 1961. (Tr. pp. 91-100.) Rehearing was denied on April 13, 1961. (Tr. p. 123.) The jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

May the United States District Court entertain an unconsented action against a State agency, by citizens of the State, or is such a suit prohibited by the Eleventh Amendment to the United States Constitution?

STATUTE INVOLVED.

The Constitution of the State of Louisiana, Article XIX, Section 26, withdrawing consent to suit against the Parish School Board.

STATEMENT OF FACTS.

Lawrence Hall and numerous other complainants filed a complaint on September 4, 1952, against the St. Helena Parish School Board and J. L. Meadows, Superintendent. (Tr. pp. 2-15.) The complainants filed as rela-

tives and or next of kin of numerous minors named in the complaint.

Jurisdiction in the United States District Court for the Eastern District of Louisiana was invoked pursuant to:

(1) U. S. C. 28:1331 and U. S. C. 8:41 and 43;

(2) U. S. C. 28:1343; U. S. C. 8:41 and 43 and the Fourteenth Amendment to the Constitution of the United States.

Injunctive relief, both temporary and permanent, was sought under 28 U. S. C. 2281 to restrain and enjoin the enforcement, execution and operation of certain alleged unconstitutional statutes and constitutional provisions of the State of Louisiana, "By restraining the action of the defendants, officers of such State in the enforcement and execution of such constitution and statutes as herein more fully appears."

Also sought was a declaratory judgment and injunction under 28 U. S. C. 2201 and 2202 for the purpose of determining questions in actual controversy between the parties.

Complainants prayed for the convening of a three-judge court to:

(1) Adjudge, decree and declare the rights and relations of the parties and enter Judgment therein;

(2) Enter a judgment or decree declaring the policy, customs, practices and usages of the defendants in denying the infant plaintiffs and other negro children equal facilities of education afforded white children unconstitutional;

(3) Declaring the rules and regulations of defendants prohibiting negro children to enter public schools with white pupils unconstitutional;

(4) Declaring Article XII, Section 1, of the Louisiana Constitution unconstitutional;

(5) That a permanent injunction issue restraining defendants from denying to negro pupils educational facilities equal to white pupils;

(6) Issue a permanent injunction restraining defendants from making any distinction based on race or color in the opportunities, advantages, and facilities provided by defendants.

On September 9, 1955, two motions to dismiss were filed and after hearings were denied on March 21, 1956. (Tr. pp. 16-21.) Again on April 25, 1956, two motions to dismiss were filed, and on October 15, 1956, the motions were heard and the matter was continued until the Court of Appeals ruled on similar motions. (Tr. pp. 22-28.)

On November 4, 1959, plaintiffs filed a motion for Summary Judgment and on March 8, 1960, a petition of intervention was filed. (Tr. pp. 28-40.)

On April 10, 1960, defendant filed an answer and an opposition to the motion for Summary Judgment. (Tr. pp. 44-52.) However, on April 26, 1960, the Court granted the motion for Summary Judgment. (Tr. pp. 69, 70.)

On May 25, 1960, Judgment was rendered in favor of plaintiffs, and on May 26, 1960, a notice of appeal was

filed. (Tr. p. 75.) The matter was heard before the Fifth Circuit on February 9, 1961. The decision of the District Court was affirmed and a rehearing denied on April 13, 1961. (Tr. p. 123.)

REASONS FOR GRANTING WRIT.

The salient question directed to the Court here is the application of the Eleventh Amendment. In this case the decisions of the courts below, if allowed to remain unaltered, or if adopted by this Court, would nullify the Eleventh Amendment to the United States Constitution. The result would violate both the spirit and letter of the amendment, as well as conflict with decisions of this Court and courts of appeal of other circuits.

In the matter at bar the petitioner is a State agency, created by State Constitution to perform certain functions, and may not be sued without consent of the Legislature first being obtained. *Louisiana Constitution*, Article 19, Section 26.

The courts below seemed to feel that a suit against a State agency cannot be considered a suit against the State. This conflicts with the preponderance of case law.

There is very little doubt that the jurisprudence of the United States as a whole and of the Federal Courts particularly is so overwhelming that a governmental agency, unless created with the power to be sued and to sue, cannot be made a party to a suit without the specific permission of its creator.

In 1952 in the District of Columbia a situation somewhat similar to this one arose, and the Court therein

realizing that the law was so well settled did not find it necessary to cite authorities since the law was so clear, and only stated:

> "At the outset it should be stated that the Board of Education and the Board of Commissioners, as such, are not entities and that therefore are not subject to suit and a motion should be granted as to them on the ground without further consideration." *Miller, et al., v. Board of Education, District of Columbia, et al.*, 106 Fed. Supp. 988, 989 (D. C., D. C., 1952).

See also:

Parker v. Board of Education of Sumter County, 70 S. E. (2d) 369 (Georgia);
Smith v. Hefner, 68 S. E. (2d) 783 (N. C.);
Stepan v. Louisiana State Board of Education, 78 So. (2d) 18, 21.

The decision in this case stems directly from a decision of the Fourth Circuit in the case of *Charlottesville v. Allen*, 240 Fed. (2d) 59 (1956). In that case for the first time, without support in jurisprudence, law or statute, a Court first enunciated the doctrine that a State agency could be sued without the consent of the State. This concept born in 1956 in the Fourth Circuit has been nurtured in the Fifth Circuit, oddly enough, only in cases involving "segregation."

When such a radical concept suddenly comes into being, it is only natural that one should go back and examine the keen analysis and irreputable logic which went into the writing of the opinion.

This earth-shaking departure from years of jurisprudence is contained all in one paragraph of the opinion located on page 63 thereof, which reads as follows:

> "It is argued that the **doctrine thus laid down must be confined to individuals and may not be applied to corporate agencies of state, such as school boards. We see no grounds for such distinction.** If high officials of the state and of the Federal Government (see Philadelphia Company v. Stimson, supra) may be restrained and enjoined from unconstitutional action, we see no reason why a school board should be exempt from such a suit merely because it has been given corporate powers. A state can act only through its agents; and whether the agent be an individual officer or corporate agency, it ceases to represent the state when it attempts to use state power in violation of the Constitution and may be enjoined from such unconstitutional action. While no such question was raised in the cases heard by the Supreme Court in Brown v. Board of Education, 347 U. S. 483, 74 Sup. Ct. 686, 98 Law Ed. 873 and 349 U. S. 294, 75 Sup. Ct. 753, 99 Law Ed. 1083, the question was inherent in the record in those cases; and it is not unreasonable to suppose that the Supreme Court would have directed injunctive relief against school boards acting as state agencies, if no such relief could be granted because of the provisions of the Eleventh Amendment of the Constitution." (Emphasis supplied.)

The first premise, that the Court saw no ground for distinction between a corporate agency of the State

and the individual, was in direct contradiction with all the jurisprudence decided on the matter up until that date.

Aerated Products Co. of Philadelphia, Pa., v. Department of Health of New Jersey, et al., 159 F. (2d) 851 (C. A. 3, 1947):

> "The Eleventh Amendment of the Federal Constitution denied to Federal Courts the jurisdiction over suits against a State by citizens of another State. The Department is a part of the executive branch of the New Jersey government. Revised Statutes of New Jersey government. Revised Statutes of New Jersey of 1937, 26:2-2-1, et seq., N. J. S. A.; Board of Health v. Mundet Cork Corporation, 1939, 126 N. J. Eq. 100, 8 A. (2d) 105, affirmed 1940, 107 N. J. Eq. 61, 11 A. (2d) 260. **Consequently, we agree with the court below that plaintiff's suit against the Department is prohibited by the Eleventh Amendment.** Ford Co. v. Department of Treasury, 1945, 323 U. S. 459, 65 S. Ct. 347, 89 L. Ed. 389.
>
> "As to Mahaffey, the rule is equally clear that **his function as a public official brings him within the protection of the Eleventh Amendment only if the statutes authorizing his actions are constitutional, and if his actions do not exceed the authority granted him.** Baldwin v. G. A. F. Seelig, 1935, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 A. L. R. 55. If the activities of Mahaffey are in violation of a right guaranteed by the federal Constitution, this court has jurisdiction to enjoin such." (Emphasis supplied.)

United States Department of Agriculture, et al., v. Hunder, et al., 171 F. (2d) 793 (C. A. 5, 1949):

> "While cases may be found in which a department or bureau of the government has been suffered to assert rights, the Department of Agriculture is not truly a juridical person being neither an individual nor a corporation. **It is an agency of the Government, not empowered to sue, or to be sued in evasion of sovereign immunity.** See United States Dept. of Agriculture v. Remund, 330 U. S. 539, 541, 67 S. Ct. 891, 91 L. Ed. 1082. The Secretary, however, is a person. If he by affirmative act exceeds his lawful authority or threatens to do so, to the injury of established rights, he may be enjoined, for in such circumstances he is not truly representing the Government." (Emphasis supplied.)

New Haven Public Schools v. General Services Administration, 214 F. (2d) 592 (C. A. 7, 1954):

> "It is admitted that the two defendants dismissed by the District Court are agencies of the executive branch of the United States Government. In other words, they are administrative departments of the Government. **It has long been established that such agencies are not truly juridical persons but are strictly representatives of the government, who may not be sued in evasion of sovereign immunity.** United States Dept. of Agriculture v. Remund, 330 U. S. 539, 541, 67 S. Ct. 891, 91 L. Ed. 1082; Herrin v. Farm Security Administration, 8 Cir., 153 F. (2d) 76; Thomason v. Works

Progress Administration, 8 Cir., 153 F. (2d) 342; North Dakota-Montana Wheat Growers' Assn. v. United States, 8 Cir., 66 F. (2d) 573, 92 A. L. R. 1484, certiorari denied 291 U. S. 672, 54 S. Ct. 457, 78 L. Ed. 1061.

"Plaintiff seeks to escape the effect of this rule for the reason, as it argues, that the suit is controlled by decisions in actions rightfully brought against individual governmental officers. It is fatal, we think, to this contention that no officers were named as parties or served with process. Indeed, such officers are subject to suit only in the District of Columbia. Blackmar v. Guerre, 342 U. S. 512, 72 S. Ct. 410, 96 L. Ed. 534. The District Court properly held that it did not have and could not entertain jurisdiction over the agencies." (Emphasis supplied.)

Evidently, the Fourth Circuit believed that the Department of Health of New Jersey could be sued directly despite the language used by the Third Circuit; that the United States Department of Agriculture could be sued despite the language of the Fifth Circuit, and that the General Services Administration could be sued despite the language used by the Seventh Circuit. But even above and beyond this, it is difficult to see how the Fourth Circuit ignored and avoided the doctrine of nonsuability of an agency of government enunciated by this Court in the case of *Blackmar v. Guerre*, 342 U. S. 512, 72 U. S. Supreme Court 410 (1952):

"Since the Civil Service Commission is not a corporate entity which Congress has authorized to be

> **sued, a suit involving the action of the Commission generally must be brought against the individual Commissioners as members of the United States Civil Service Commission.** No such suit was brought here, and no service was had upon the individuals comprising the Civil Service Commission. Therefore, neither the individuals comprising the Civil Service Commission nor the Commission as a suable entity was before the District Court." (Emphasis supplied.)

Again it would appear that the Court ignored the permissible limits recently established by this Court when it stated unequivocally that it would only allow a suit against an individual in order to enjoin unconstitutional action.

> "Passing to the jurisdictional ground upon which District Court rested its decision, we note that the State of Georgia was not named as a party in the District Court. But since the appellee is a state officer, the Court below probably considered whether the relief sought against the officer is not, in substance, sought against the sovereign. If this action is in effect, an unconsented suit against the State, the action is barred.
>
> "The District Court characterize appellant's action as one to enforce an alleged contract with the State of Georgia, and, as such, suit against the State but appellant's complaint is not framed as a suit for specific performance. It seeks to enjoin appellee from collecting taxes in violation of appellant's right under the Federal Constitution. **This**

> **Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state.** These decisions were re-examined and re-affirmed in ex parte Young, 1908, 209 U. S. 123, 28 Sup. Ct. 441, 52 Law Ed. 714, and have been consistently followed to the present date. This general rule **has been applied in suits against individuals** threatening to enforce allegedly unconstitutional taxation, including cases where, as here, it is alleged that the taxation would impair the obligation of contracts. Georgia Railroad and Banking Company v. Redwine, 72 Sup. Ct. 321, 324, 342 U. S. 299." (Emphasis ours.)

It is earnestly and hopefully urged that this doctrine annunciated by the Supreme Court in these cases will incur the same universal application as does the *Brown* decision.

The next premise upon which the Court based its decision is equally as untenable as the prior one. It stated that since the jurisdictional question was not raised in the *Brown* case, it was inherent in the record and it would not be reasonable to suppose the Supreme Court would have allowed the injunctive relief against the state agency if the relief could not be granted. It seems to be rather weak to say that there definitely is jurisdiction in a case since the Supreme Court failed to note that there was no jurisdiction, and this is even more so true, since, if the record were carefully read,

it would be noted that in the *Brown* case the Kansas statutes had specifically given to the School Board the power to sue and be sued, and, for that reason, the question of jurisdiction, and or suit against the state was never raised and hence never decided.

While petitioners herein are certain that the suit was in contravention of the Eleventh Amendment, as being a suit against the State, subsequent proceedings eliminated any possibility of doubt. On the day of March, 1956, the United States District Court, in a proceeding to enforce its order, made the State of Louisiana a party to this matter. The order reads as follows:

"IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
LOUISIANA, BATON ROUGE
DIVISION

CIVIL ACTION

NO. 1068

LAWRENCE HALL, et al.,

Plaintiffs,

v.

ST. HELENA PARISH SCHOOL BOARD, and
J. L. MEADOWS, Superintendent,

Defendants.

ORDER ADDING PARTIES DEFENDANT

IT APPEARING from the motion of the United States *amicus curiae* herein, that it is in the interest of justice to add as parties defendant

in this action the STATE OF LOUISIANA; JIMMIE H. DAVIS, Governor of Louisiana; JACK P. F. GREMILLION, Attorney General of Louisiana; MURPHY J. RODEN, Director of Public Safety of Louisiana; DUNCAN S. KEMP, District Attorney of St. Helena Parish; and R. D. BRIDGES, Sheriff of St. Helena Parish,

IT IS ORDERED that each of them be and they are hereby added as parties defendant in this action, and the marshal is directed to serve upon each of them a copy of this order together with a copy of the motion and petition of the United States.

New Orleans, Louisiana, March 1961.

s J. SKELLY WRIGHT
UNITED STATES DISTRICT JUDGE"

Petitioners cannot conceive of a bolder or more unrestrained violation of the Eleventh Amendment than the one occurring herein. If this rule of jurisprudence is allowed to stand the Eleventh Amendment will in effect be read out of the Constitution. It will be simple for any person to file suit against the State Officer, alleging the unconstitutionality of a State Statute, and after judgment is obtained, making the State a party to the enforcement of any judgment obtained.

CONCLUSION.

For the reason stated above, petitioner herein feels that it is incumbent upon this Court to preserve, fully and completely, the positive prohibition contained in the

Eleventh Amendment by reversing the decision of Courts below.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
Baton Rouge, Louisiana;
CARROLL BUCK,
First Asst. Attorney General;
WILLIAM P. SCHULER,
Assistant Attorney General;
DUNCAN S. KEMP,
District Attorney,
Attorneys for Appellants.

PROOF OF SERVICE.

I, WILLIAM P. SCHULER, one of the attorneys for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on A. P. Tureaud, Esquire, counsel for respondents, by mailing a copy thereof, postage prepaid, addressed to his office, 1821 Orleans Avenue, New Orleans, Louisiana.

Dated this day of June, 1961.

WILLIAM P. SCHULER,
Assistant Attorney General,
State of Louisiana

APPENDIX "A"

CONSTITUTION, STATE OF LOUISIANA, 1921, ARTICLE XIX, SECTION 26.

Section 26. The following named commissions, boards, bodies or municipal corporations are and shall be considered special agencies of the State of Louisiana:

(1) The State Parks Commission of Louisiana.

(2) The Recreation and Park Commission for the whole Parish of East Baton Rouge.

(3) All recreation districts created under terms of Article XIV, Section 14 (d-4) of this Constitution;

(4) Any municipal corporation, parish or subdivision of the State in matters respecting the operation or maintenance of parks and other recreational facilities or in connection with any rule or regulation applicable thereto.

(5) The State Board of Education.

(6) The Board of Supervisors of Louisiana State University & Agricultural & Mechanical College.

(7) The parish school boards of each of the parishes of the State of Louisiana.

(8) The school boards of the municipalities of Monroe in Ouachita Parish and Lake Charles in Calcasieu Parish, and Bogalusa in Washington Parish.

(9) The State Superintendent of Public Education in his capacity as such as well as in the capacity of ex-officio secretary of the State Board of Education, and

(10) The State Department of Education.

The consent of the State of Louisiana to suits or legal proceedings against any of the above listed special agencies, (however heretofore given) is hereby expressly withdrawn and no such suit or proceeding shall be permitted except as provided in this section. This withdrawal of consent to suits and legal proceedings shall apply not only to suits and legal proceedings filed in the future but also to any pending suits or legal procedure. There is expressly excepted from the foregoing, suits for the enforcement of contracts entered intc by any of the special agencies or for the recovery of damages for the breach thereof. Additionally, the Legislature of Louisiana may, in individual cases, by appropriate act grant to any party showing just and reasonable cause the right to sue any of these special agencies, in compliance with Section 35 of Article III of this Constitution.

This Section shall be self-operative and shall supersede any other portion of this Constitution or any statutes or regulations in conflict herewith. (Act 613 of 1956, adopted November 6, 1956).

APPENDIX "B"

ORDER GRANTING MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT & DENYING ALL OTHER MOTIONS

Minute Entry April 28, 1960 Wright, J.

(Number and Title Omitted)

This cause came on at a former day, for hearing on the motion of plaintiffs for summary judgment herein, as well as on the motion of Carl Harvin and Catherine Harvin, etc., et al., to intervene as defendants in this action, and on the motion of defendants to dismiss, and was argued by counsel for the respective parties and submitted, when the Court took time to consider.

Now, after due consideration thereof;

IT IS ORDERED by the Court that the motion of plaintiffs for summary judgment herein, be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED by the Court that the motion of Carl Harvin and Catherine Harvin, etc., et al., to intervene as defendants, be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED by the Court that the motion of the defendants, to dismiss this action, be, and the same is hereby DENIED.

(Signed) J. S. W.

JUDGMENT

(Number and Title Omitted)

Filed: May 24, 1960

Entered: May 25, 1960

This cause having come on for hearing on the 29th day of April, 1960, on plaintiffs' motion for summary judgment, and the court being of the opinion that the motion for summary judgment should be granted.

IT IS ORDERED, ADJUDGED AND DECREED that the defendant St. Helena Parish School Board, its agents, its servants, it employees and successors in office, and those acting in concert with them, be, and they are hereby, restrained and enjoined from requiring segregation of the races in any school under their supervision, and from engaging in any and all action which limits or affects the admission to, attendance in, or education of plaintiffs or any other negro child similarly situated in schools under defendants' jurisdiction, on the basis of race and color, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed, as required by the decision of the Supreme Court in *Brown v. Board of Education of Topeka*, 349 U. S. 294.

This court retains jurisdiction of this cause for the purpose of entering such further orders or granting such further relief as may be necessary to bring about compliance with this decree.

(Signed) J. SKELLY WRIGHT
UNITED STATES
DISTRICT JUDGE

CORRECTED REPRINT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18523

ST. HELENA PARISH SCHOOL BOARD, ET AL,
Appellants,

versus

LAWRENCE HALL, ET AL,
Appellees.

MARK EDWARD HARVIN, minor, by his parents and next friends, KARL HARVIN and KATHERINE HARVIN, ET AL,
Appellants,

versus

LAWRENCE HALL, ET AL,
Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana.

(February 9, 1961.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and MIZE, District Judge.

TUTTLE, Chief Judge: The Parish School Board and the individual codefendant, the Superintendent of Parish Schools, appeal from a summary judgment granted to the appellee Negro students in the form of a permanent injunction against further operation of the public schools of the parish on a racially segregated basis. The order appealed from is in substantially the same terms as that entered by the District Court in the case of *Bush, Et Al. v. Orleans Parish School Board*, affirmed by this court at 242 F. (2d) 156 and provided as follows:

> "This cause having come on for hearing on the 29th day of April, 1960, on plaintiffs' motion for summary judgment, and the court being of the opinion that the motion for summary judgment should be granted.
>
> IT IS ORDERED, ADJUDGED AND DECREED that the defendant St. Helena Parish School Board, its agents, its servants, its employees and successors in office, and those acting in concert with them be, and they are hereby, restrained and enjoined from requiring segregation of the races in any school under their supervision, and from engaging in any and all action which limits or affects the admission to, attendance in, or education of plaintiffs or any other Negro child similarly situated in schools under defendants' jurisdiction on the basis of race and color, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed, as required by the decision

of the Supreme Court in Brown v. Board of Education of Topeka, 349 U. S. 294.

This Court retains jurisdiction of this cause for the purpose of entering such further orders or granting such further relief as may be necessary to bring about compliance with this decree."

It will be noted that no date for the effective compliance with the order has been set. It is thus much in the nature of a judgment in a suit for declaratory judgment.

The basis of the appeal by the Parish School Board, urged here by the Board's attorney and the Attorney General of the State of Louisiana and his assistants is three-fold. The grounds as stated in the appellants' brief are:

"The lower Court erred in holding:

"I.

That the St. Helena Parish School Board, an agency of the State of Louisiana, could be made a party defendant in this suit.

II.

That the complainants could seek relief in the District Court until such time as they had exhausted their administrative remedies.

III.

That the evidence before the Court justified the granting of a Summary Judgment."

The appellants urge us to reconsider the express holding by this court in two previously decided cases to the effect that an action to restrain a school board or board of supervisors of a state educational institution is not a suit against the state of Louisiana and thus forbidden by the Eleventh Amendment of the United States Constitution. The two previous decisions in which we have held that suits similar to that which is now before the Court are permissible are *Orleans Parish School Board v. Bush*, 5th Cir., 242 F. (2d) 156, cert. den. 354 U. S. 921 and *Board of Supervisors of L.S.U. v. Flemming*, 5th Cir., 265 F. (2d) 736, and see *Dorsey v. Athletic Commission*, D. C. La., 168 F. Supp. 149, aff'd 359 U. S. 533. We think that the decisions in these cases were correct, and we decline the invitation to reverse them.

Turning to the next ground of appeal, we find that this contention has also been authoritatively answered several times by this court. We have repeatedly held that the adoption of a pupil placement law does not prevent the Negro students acting either individually and as members of a class from seeking a declaratory judgment of their right to have an end to a parish or other local school policy of racially segregated schools. As we said in the Orleans Parish School Board case, *supra:* "Appellees were not seeking specific assignment to particular schools. They, as Negro students, were seeking an end to a local school board ruling that required segregation of all Negro students from all white students. As patrons of the Orleans Parish School System, they are undoubtedly entitled to have the District Court pass on their right to seek relief." We there cited *Jackson*

v. Rawdon, 5th Cir., 235 F. (2d) 93, cert. den. 352 U. S. 925. See also *Board of Supervisors of L.S.U. v. Fleming, Supra*, page 738, and *Mannings v. Board of Public Inst. of Hillsborough County*, 5 Cir., 277 F. (2d) 370.

The third ground of appellants' appeal is that the state of the record did not permit the granting of a summary judgment.

The only arguments made by the appellants on this ground are:

> "This matter was heard before the Court solely and exclusively upon the complaint filed September 4, 1952, and Judgment rendered on May 25, 1960, or nearly eight years later. Many changes took place during this time which could only have been gone into by actual trial.
>
> It is axiomatic that the Federal Courts will not decide a disputed factual situation on a motion for Summary Judgment.
>
> . . . . . .
>
> It is strongly urged that in view of the Jurisprudence the trial court should have refused to hear the matter on motion for summary judgment, and in failing to so do grossly exceeded any discretion that might be vested in it."

Although they do not take the trouble to specify a single fact which they say is in dispute, appellants apparently seek to base this ground on the fact that in their original complaint, filed before the decision of the School Segregation Cases, *Brown v. Board of Education of Topeka, Kansas*, 347 U. S. 483 and related cases, they

sought relief on two grounds, and on one of them there is a factual issue. The first basis of the complaint was that the Negro schools in Helena Parish, Louisiana, were not physically equal to the white schools of the Parish and were thus not in keeping with the "separate but equal" standard. The second ground was that the maintenance of racially segregated schools was inherently discriminatory. Appellants contend that since in their answer they denied the lack of physical equality between the Negro and white schools this makes an issue of fact which cannot be disposed of by summary judgment.

This argument overlooks the fact that the complaint also attacks the pattern of racial segregation in the St. Helena Parish School System as being in violation of the plaintiffs' Constitutional rights. Since the appellants would be entitled to injunctive relief upon either theory, it is immaterial that they have not gone forward to prove the existence of actual inequalities between two sets of schools. However, this fact is impliedly admitted by the answers of the defendants which said:

> "That defendant herein, St. Helena Parish School Board, has at this time substantially corrected the inequalities and defects complained of by the plaintiffs herein, and are, at this time, attempting to completely eliminate any equality (sic) therein."

Although the answer, filed some six years after the complaint was originally filed, denies the allegation of the complaint that the defendants "are pursuing the policy, practice, custom and usage of establishing and maintaining separate schools for white and Negro chil-

dren residing in St. Helena Parish," there can be no actual doubt as to the correctness of this allegation in light of the Louisiana statutes in effect at the time of the entry of the judgment of the trial court. At that time Act 256 of the Legislature of 1956 empowered and authorized the governor to close any racially mixed public school and Act No. 249 of the Legislature of 1956 denied teacher tenure protection to any teacher found guilty of "advocating or in any manner . . . bring about integration in the public school system . . .". Moreover, the Pupil Placement law, pleaded by appellants as depriving the trial court of the right to entertain this suit, provides in Section 7 as follows:

> Section 7. Any other provisions of law notwithstanding, no child shall be compelled to attend any school in which the races are commingled when a written objection of the parent or guardian has been filed with the School Board. If in connection therewith a requested assignment or transfer is refused by the Board, the parent or guardian may notify the Board in writing that he is unwilling for the pupil to remain in the school to which assigned, and the assignment and further attendance of the pupil shall thereupon terminate; . . .

As to such a provision, this court has recently said in *Boson v. Rippy*, 5th Cir. F. (2d) decided December 2, 1960. "Such a provision recognizes race as an absolute ground for the transfer of students and its application might tend to perpetuate racial discrimination." We therefore caused it to be removed from the plan of the Dallas, Texas School Board adopted for

the purpose of complying with the Constitutional requirements. No effort was made by appellants to show that the St. Helena Parish School Board was operating in violation of these provisions, as set out in the Louisiana Statutes. So far as we know, none of these provisions has yet been expressly brought under attack and declared to be unconstitutional.

We conclude that on the record thus made the trial court properly found that there was no substantial issue of fact remaining for the trial, and the grant of summary judgment was authorized.

An appeal also has been filed in this case by Mark Edward Harvin by his parents asserting that he is a school child of the white race and that he has an absolute right to intervene to oppose the relief sought by the plaintiffs below. The trial court dismissed the petition for intervention.

The thrust of the argument of the unsuccessful intervenor is that as a patron of the school system he will be bound by the court's decision and that he therefore has a right for intervention under Rule 24 F.R.C.P., which provides as follows:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action . . .
>
> (2) When the representation of the applicant's interest by existing parties is or may be made inadequate and the applicant is or may be bound by a judgment in the action. . . ."

We agree with the trial court that the intervenor failed to make the showing that the representation of his interest in the litigation was or might be inadequate. We also conclude that no legally permissible basis for denying the relief sought in the complaint was pleaded of the intervenor. It was merely an effort of the intervenor to obtain a ruling in this trial court that the Supreme Court decision in the School Segregation case was erroneous. This the district court had no power to do.

We therefore conclude that it was not error for the trial court to dismiss the intervention.

The judgment is AFFIRMED.